Court of Appeals, State of Michigan

ORDER

People of MI v Robert Milton Vangeison

Docket No. 254117

LC No. 03-048408 FH

Richard A. Bandstra
Presiding Judge

Helene N. White

Karen M. Fort Hood
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued April 18, 2006 is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 13 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 13, 2006
v	No. 254117 Muskegon Circuit Court
ROBERT MILTON VANGEISON, Defendant-Appellant.	LC No. 03-048408-FH ON RECONSIDERATION

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver between 225 and 650 grams of cocaine, MCL 333.7401(2)(a)(ii), and one count of possession of marijuana, MCL 333.7403(2)(d).[1] Defendant appeals as of right, and we affirm.

Defendant was a cocaine user and also sold various quantities to his friends. Defendant's primary supplier of drugs was arrested. However, he maintained contact with an associate of his supplier. The associate was arrested for violation of probation for his own drug use and offered to work as a police informant to avoid a prison term by engaging in a reverse sale with defendant. The associate made arrangements to meet defendant in a parking lot to exchange ten ounces of cocaine for cash. After the exchange, defendant was arrested. Defendant cooperated with police by admitting his prior use and sale of cocaine. However, at trial, defendant testified that he only intended on purchasing four or five ounces of cocaine, and the associate surprised him with a supply of ten ounces. Trial counsel also disputed whether defendant was in possession of the drugs at the time of arrest during closing arguments. Although the jury was given instructions for lesser included offenses, defendant was convicted as charged.

Defendant first alleges that the amended sentencing provisions of MCL 333.7401(2)(a)(iii) should be applied retroactively. Statutory amendments are presumed to

[1] MCL 333.7401 was amended by 2002 PA 665, effective March 1, 2003. Section 7401(2)(a)(ii), as amended, now applies to quantities in excess of 450 grams, but less than 1,000 grams of a controlled substance. Our reference is to the prior statute. Defendant was sentenced to 20 to 30 years' imprisonment for the possession with intent to deliver conviction, and thirty-three days in jail, with credit for time served, for the possession of marijuana conviction.

operate prospectively unless the Legislature clearly manifests the intent to the contrary. *People v Thomas*, 260 Mich App 450, 458-459; 678 NW2d 631 (2004). This Court has rejected the contention that the amended statute, MCL 333.7401, can be applied retroactively because the plain language does not contain any such legislative intent. *People v Doxey*, 263 Mich App 115, 121-122; 687 NW2d 360 (2004); *Thomas, supra*. In *Thomas*, this Court also noted that even if the amendments to MCL 333.7401 were given only prospective application, MCL 791.234 provided relief to a convicted defendant because it set forth parole eligibility prior to the completion of the minimum term.

Defendant alleges that he is nonetheless denied the equal protection of the laws because the provisions of MCL 791.234(11) governing parole eligibility[2] only apply to individuals convicted before March 1, 2003. It is alleged that he does not fall within the provisions of *Doxey* or *Thomas* because his conviction date after March 1, 2003, does not provide him with the early parole eligibility provisions found in MCL 791.234. However, appellate courts do not unnecessarily decide constitutional issues. *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001). Constitutional questions should not be decided if a case may be resolved on other grounds. *J & J Construction Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 733-734; 664 NW2d 728 (2003). An issue is not ripe for adjudication unless and until there is an encroachment upon a constitutional right. *Straus v Governor*, 459 Mich 526, 544; 592 NW2d 53 (1999). The implications of the construction of MCL 791.234 are not yet ripe for appellate review. Defendant has not yet served ten years' imprisonment or his minimum term. We further note that our Supreme Court has indicated that MCL 791.234(11) might properly be read as refering to those who violated or conspired to violate MCL 333.7401(2)(a)(ii) before March 1, 2006, rather than those convicted before that date. *People v Doby*, 474 Mich 955; 706 NW2d 741 (2005), amended 711 NW2d 13 (2006). This construction would render this case indistinguishable from *Thomas, supra,* and *Doxie, supra*.[3]

Defendant next alleges that his case should be remanded for resentencing in light of recent case law holding that there may be substantial and compelling reasons to deviate from the mandatory minimum sentences provided in the former MCL 333.7401(2)(a)(ii). However, the amendments to MCL 333.7401 do not provide a substantial and compelling reason to depart below the mandatory minimum sentences set forth in the prior version of this statute. *People v Michielutti*, 474 Mich 889; 704 NW2d 705 (2005).[4]

Defendant also filed a supplemental brief pursuant to administrative order 2004-06 raising issues that were not preserved by objection for appellate review. Forfeited error is

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[2] This provision allows for consideration for parole eligibility after serving the minimum term or ten years, whichever is less. MCL 791.234(11).

[3] Defendant also alleged that, as an alternative to retroactive application, he should be "sentenced under the amended parole provisions of [MCL] 791.234(11) …." However, MCL 791.234 is not a sentencing provision, but merely a parole eligibility provision. Accordingly, this claim of error does not entitle defendant to appellate relief.

[4] Although only an order, an order of the Supreme Court is binding precedent where the rationale can be understood. See *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996).

reviewed to determine whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Defendant alleges that he was denied his constitutional right to a fair trial based on prosecutorial misconduct. Specifically, defendant asserted that the prosecutor failed to provide discovery, denigrated defense counsel, and improperly commented on the evidence. The challenge is without merit. The prosecution is not required to provide discovery evidence unless it is material. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). Material evidence is exculpatory evidence that would raise a reasonable doubt about defendant's guilt. *Id*. The challenged discovery cited by defendant did not constitute material evidence because it did not raise doubt regarding defendant's guilt, particularly in light of his admissions to police.

Following review of the record, we also conclude that the prosecutor did not denigrate defense counsel or improperly comment on the evidence. Issues of prosecutorial misconduct are decided on a case by case basis by reviewing the pertinent portion of the record in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test is whether the defendant was denied a fair trial. *Id*. The remarks must be read as a whole and evaluated in light of defense arguments and the relationship to the evidence admitted at trial. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). Prosecutors are afforded great latitude during argument, and they may argue the evidence and all reasonable inferences that arise from the evidence in relationship to the theory of the case. *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001). Argument need not be phrased in the blandest possible terms. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). We conclude that the prosecutor acted within the appropriate guidelines for arguing facts and reasonable inferences from the evidence and did not denigrate defense counsel. Therefore, plain outcome determinative error is not present.

Defendant next alleges that the jury instructions did not properly advise the jury of the specific intent needed to deliver the statutory minimum. We disagree. In *People v Marion*, 250 Mich App 446, 448-450; 647 NW2d 521 (2002), this Court rejected this argument and adhered to the principle that knowledge was not an essential element of delivery, possession with intent to deliver, or possession of a controlled substance offenses. The elements of possession with intent to deliver cocaine are: (1) the substance was cocaine; (2) the drug was in a mixture which weighed more than 225 grams but less than 650 grams; (3) the defendant was not authorized to possess the substances; and (4) the defendant knowingly possessed the cocaine with the intent to deliver. *Id*. at 448-449. Because quantity is not an element of possession with intent to deliver, *id*. at 450-451, defendant's attempt to distinguish between personal use and delivery to others[5] and require a corresponding instruction is without merit.

Lastly, defendant alleges that he was denied the right to effective assistance of counsel. We disagree. Effective assistance of counsel is presumed and the defendant bears a heavy

[5] Moreover, this issue was presented to the jury. Defendant testified regarding his personal use of cocaine. Nonetheless, defendant was convicted as charged.

burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Knapp, supra* at 385-386. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*. Decisions regarding the evidence to be presented and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We do not substitute our judgment for that of trial counsel when addressing issues of trial strategy, and we do not view counsel's competence with the benefit of hindsight. *Id*. at 76-77. When record evidence of ineffective assistance of counsel is not present, our review is limited to mistakes apparent on the record. *Id*. Applying these rules, the representation by defense counsel was reasonable under prevailing professional norms.[6]

Affirmed.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Karen M. Fort Hood

[6] Defendant raises various questions about the admissibility of an audiotape with omissions in the tape, and that defense counsel should have moved to suppress the tape. Because we do not have the audiotape, we do not have record evidence to make any such assessment. Additionally, the failure to challenge the tape may have been deliberate trial strategy because of its quality.